

B. TAX OR STATUS CASES

1. Introduction

If you disagree with a determination regarding your liability for taxes or status as an employer, you have the right to appeal the determination by requesting a hearing before an administrative law judge (ALJ). Unlike appeals of benefit cases in which a person claiming benefits is involved, the parties involved in tax cases are the department and the employer.

At the hearing. The department will be represented by an attorney. However, the department's attorney has nothing to do with scheduling hearings or with postponements or other changes once the hearing has been scheduled.

An ALJ, who is an attorney, conducts the hearing and makes sure that both you and the department have the opportunity to present your cases. This is important because the ALJ's decision may change the previous determination ruling on employer liability or status. Having a hearing is like "starting from scratch," as though the earlier determination were never made. Only evidence and testimony presented at the hearing will be considered by the ALJ.

Although the hearing is not a trial, it *is* a formal proceeding. Witnesses are sworn to tell the truth. Statutory and common law rules of evidence are not controlling. Administrative procedural rules on burden of proof, cross-examination, and limits on the use of hearsay evidence are followed.

2. How to Appeal

a. Filing an appeal

- A request to appeal a determination must be in writing. To appeal, you must write to the department stating that you are appealing a determination.
- Include a copy of the determination or clearly identify the determination by its nine-digit

number located in the upper left-hand corner.

- Include dates and times when you and your witnesses and representatives are not available for a hearing. The department will try to accommodate your request.
- Indicate any special needs such as an interpreter or other accommodations needed due to disability.
- You, your agent, or your attorney must sign the appeal.
- The appeal should be mailed, faxed, or delivered during office hours to the hearing office listed on the back of the determination under WHERE TO FILE AN APPEAL.

Deadline. A written request for a hearing (appeal) must be postmarked or received **within 21 days** of the date on which the determination was issued. The deadline is printed on the determination. The person appealing is called the **appellant**. The person responding to the appeal is called the **respondent**.

b. Late appeals

See section A.2.b. above, which deals with benefit cases for information on late appeals.

3. Scheduling and Notice of Hearing

a. Scheduling a hearing date

All hearings are scheduled by the Madison Hearing Office and held in various locations throughout the state.

The hearing office addresses and telephone numbers may be found in Appendix A.

Notice of Hearing. Parties will be sent a **Notice of Hearing** at least 5 days in advance of the hearing. The

Notice contains important information you will need to know about the scheduled hearing, including:

- the **time, date, and location of the hearing**;
- whether you will appear in person or by telephone;
- what issue(s) will be taken up at the hearing.

To see **sample hearing notices**, see Appendix B in this section.

Questions before the hearing. If you have questions about the issue(s) before the hearing, contact the hearing office listed on the Notice of Hearing.

PLEASE READ BOTH SIDES OF THE HEARING NOTICE CAREFULLY. To see sample hearing notices, see Appendix B.

The Notice of Hearing will tell you what issue(s) will be taken up at the hearing. Make sure you understand the specified issue(s) and prepare your case with those issue(s) in mind.

b. Scheduling accommodations

When you file an appeal or are notified that the claimant has filed an appeal, **contact the hearing office immediately to request scheduling accommodations** if you have scheduling conflicts in the coming month, such as a pre-planned trip, convention, medical appointment, court date, etc. **The hearing office cannot promise** any specific date and time, but it **may** be able to schedule around the conflict.

However, keep in mind that parties are expected to make the necessary arrangements to attend the hearing, including taking time off from work or school.

Postponements of scheduled hearings are granted *only for*

exceptional circumstances and must be requested as soon as the need for postponement becomes known.

c. Withdrawals

The appellant may withdraw the appeal at any time before a decision on the merits is issued. If the appeal is withdrawn, no hearing will be conducted unless the other party has also filed an appeal. The determination, the last decision made by the department, remains in effect and becomes final without further appeal rights. A withdrawal may be made by phone or in writing to the hearing office listed on the Notice of Hearing.

4. Attendance at the Hearing

a. Introduction

In tax or status cases it is very important for you attend the hearing. These cases require detailed knowledge about your business that probably only you can provide.

Follow the instructions on your hearing notice. You must report in person if you are scheduled to appear in person. If you are scheduled to appear by telephone, you must be available to be reached at the telephone number you provide to the hearing office. Make sure that you **arrange with the hearing office** if you decide to appear in person, **but you have been scheduled to appear by telephone.**

For more information on telephone hearings, see sec. B.5.

b. Failure to appear at the hearing

Appellant fails to appear. If the appellant does not attend the hearing, the appeal is dismissed. The determination, which was the last decision made by the department, remains in effect and

becomes final (unless good cause for failing to appear is shown). The ALJ will wait 15 minutes before dismissing the appeal.

Respondent fails to appear. If the respondent does not attend the hearing, he or she gives up the chance to present evidence and testimony at the hearing (unless good cause for failing to appear is shown). The ALJ will wait five minutes before proceeding with the hearing without the respondent.

Good cause for failure to appear. If you do not appear for a hearing and feel that you had good cause for failing to appear, you may provide a written explanation of your reasons for not appearing. This written explanation may be submitted at any time before the decision is issued and within the 21-day appeal period after the decision is mailed. The ALJ will decide whether to schedule a hearing on the nonappearance issue only, or whether to schedule a hearing on the nonappearance issue and conditionally on the merits of the case.

A new hearing on the merits of your case will be scheduled only if you establish good cause for not appearing. A person's illness, an accident, or unexpected circumstances that would prevent a person from attending a hearing may be good cause. Forgetting about the hearing, writing the wrong date on your calendar, getting lost, or getting stuck in traffic generally are not considered to be good cause.

5. Telephone Hearings

A telephone hearing is one in which one or both parties appear by telephone.

Telephone hearings are not typically scheduled in tax cases because of the complexity of the cases and the number of exhibits usually involved.

A telephone hearing may be requested at any time, although the sooner the better.

Be sure to let the hearing office know you are requesting a telephone hearing for a tax case. This will give the department advance notice to schedule

your hearing at a location with telephone hook-ups.

For complete information on telephone hearings, see A.5.

6. Preparing for the Hearing

a. General information

See section A.6., which deals with benefit cases.

If you want to attend a hearing or get a copy of a tape recording of a hearing, be sure you let the person you contact know that you are interested in a **tax** hearing.

b. Settlements and compromises

Under very limited circumstances, the department may settle a pending case or compromise on the amount your business (or you individually) owe in taxes (or reimbursements if you are a reimbursable employer), interest, penalties, and costs. Administrative rule DWD 113 discusses when such agreements may be made.

A copy of this administrative rule may be obtained at most public libraries, at the UI Division web page <http://www.dwd.state.wi.us/uibola/>, or by contacting the UI Bureau of Legal Affairs at (608) 266-3189.

a. Burden of proof and level of certainty required

Who has the "burden of proof" (that is, who must show that a particular thing is true) depends on the issue(s) involved in that particular case. For example, there is a presumption that a worker is an employee (and not an independent contractor), unless you prove to the department that the worker is not an employee. Therefore, it is the employer's burden to prove that the worker is not an employee.

Preponderance of the evidence.

The vast majority of cases involve proof by a “preponderance of the evidence.” This means that whoever has the burden of proof must show that it is more probable than not that whatever the party claims is true. For example, if you are trying to prove that certain wages shouldn’t be counted as wages for tax purposes because they were paid for agricultural labor, you must convince the ALJ that it is more probable than not that the work performed was agricultural labor.

b. Witnesses

Ask people who have **firsthand knowledge** of your case (not just what someone told them) to appear as your witnesses. They should have actual, direct, personal knowledge of whatever they are testifying about.

An affidavit or written statement (even if notarized) cannot substitute for the personal appearance of a witness. The witness must be present at the hearing or appear by telephone, be sworn in and subject to questioning by the ALJ and the other party.

Hearsay. The ALJ cannot make any findings based solely on hearsay testimony, that is, testimony not within the witness’s own personal knowledge.

For example, if you want to present evidence that a worker you believe to be an independent contractor has applied for a federal employer identification number (FEIN), you need the worker who filed the application **or** an eyewitness to testify.

Both the worker who filed the application and the eyewitness have direct, firsthand knowledge of what happened (“I took the application to the IRS office,” and “I went with Joe to the IRS office and saw him give them the application.”). Either one can

provide direct testimony that the IRS received the FEIN application. An example of hearsay or secondhand knowledge would be if a witness testified that “Joe told me that he filed the application.”).

Repetitious testimony. The ALJ will limit repetitious testimony. If a number of people witnessed a particular incident, you do not have to bring all of them -- choose one or two with the best information.

However, be sure to bring sufficient witnesses to testify about each important part of your case. For example, if your case involves the question of whether six workers are independent contractors or employees, bring witnesses who have firsthand knowledge about your business relationship with each worker or the business setup of each worker. It is **not** enough to bring one of the workers and then testify that the rest of the workers are in the same situation.

Relevant testimony. The ALJ will also not permit testimony from witnesses that is not relevant or not material to the issue involved in your case. Relevant evidence is evidence that tends to make any important fact more probable than without the evidence.

Subpoenas. If you are not sure that someone you want to appear as a witness will come to the hearing, you can require a witness to attend by getting a subpoena. For more information, see sec. B.6.f. below.

c. Exhibits

You may wish to introduce documents (such as contracts or financial records), photographs, video or audio tapes, charts, objects, sample products, etc., in presenting your case. Again, the ALJ may refuse to accept any such evidence which is

not relevant and material to the issue(s) involved in the case.

Photocopies may be submitted, but the original documents should be brought to the hearing to confirm the authenticity of the photocopies. Generally, the person responsible for creating or keeping the records should be present at the hearing to identify, authenticate, and testify about them.

Supplying your own video or audio equipment. If evidence on a video or audio recording is important to your case, **you must supply the equipment** to play the taped material at the hearing and submit the tape(s) as part of the record while the appeal is pending (after which it may be returned to you).

For important information about exhibits at a telephone hearing, see secs. B.5. and A.5. above.

f. Subpoenas

See section A.6.f. above.

7. Prehearing Conferences

ALJs may schedule prehearing conferences pursuant to DWD 140.07. However, they will be used only in the most complex cases.

Following the conference, the ALJ will issue an order about matters such as stipulations about facts (both sides agreeing that certain facts are true), limitations on the number of witnesses, stipulations about evidence, and any other matters that might help the hearing process.

A copy of administrative rule DWD 140.07 may be obtained at most public libraries, at the UI Division web page www.dwd.state.wi.us/uibola/, or by contacting the UI Bureau of Legal Affairs at (608) 266-3189.

8. The Hearing

a. Accessibility

See section A.8.a. above.

b. The basics

Although UI hearings are open to the public, it is very unusual for persons who are not part of your case to attend your hearing. The department will be represented by an attorney from the UI Division. A record is made of the hearing, either by a court reporter or a tape recorder. To make sure that a good record of the hearing is made, it is important to speak loudly and clearly, not rustle papers, and not interrupt, argue or talk at the same time as someone else.

The ALJ will introduce himself or herself, identify the people in the hearing room, explain the hearing procedures, introduce the hearing by summarizing the determination issued by the department, define the issue(s) involved in the case, and obtain brief statements from both parties about their positions.

The **brief statement** is not intended to include the details of your case; it is only to provide a quick description of what you are claiming. An example would be: "I believe Paul Smith and Phil Jones are independent contractors.

The ALJ will determine the order in which you and any witnesses will testify. You and any witnesses will be sworn in before testifying. The ALJ is responsible for getting all the information necessary to fully understand the facts of your case, to make a good record, and to have all of the information necessary to make a decision in your case. Accordingly, the ALJ will question you and your witnesses.

You (or your representative) may make objections to certain questions. However, you will not be allowed to interrupt or argue with witnesses who

are testifying. This is their chance to present their testimony. You or your representative will be given a chance to ask questions of the department's witnesses (called cross-examination) and to present your own testimony. It may be helpful to bring a pen and paper to take notes during the testimony. The department's attorney may also cross-examine you and your witnesses.

Cross-examining a witness involves asking questions about the witness's testimony or getting the witness to provide additional information important to your case. It does **not** involve beginning to provide your own testimony about what happened (you will get your own chance to do that). For example: Joe Smith testifies that you paid him \$500 on March 21. You can ask questions about that (such as: "Did I pay you by check?"), but you cannot argue or rebut what he said (such as: "But part of that was repaying a loan!") Additional witnesses who have knowledge of the case may also be called. These may include UI Division employees, department auditors, etc. Both you and the department may question these witnesses.

Duties of the ALJ. The ALJ is responsible for controlling the hearing, making sure that the rules of evidence are followed, and protecting the due process rights of both parties. The ALJ may order that witnesses be sequestered (remain outside the hearing room while other witnesses testify) so that the witnesses are not influenced by the testimony of other witnesses. The ALJ may limit or exclude the testimony of witnesses if the testimony is repetitive, irrelevant, immaterial, or based solely on hearsay. (For more information on hearsay, see sec. B.6.d.)

After both you and the department have had the chance to present evidence and witnesses, the ALJ will end the hearing.

9. After the Hearing

After the hearing, the ALJ will review the testimony and the exhibits received at the hearing, decide how the unemployment insurance law applies to the facts, and issue a written decision. The decision will be based solely on what was testified to under oath and the evidence presented at the hearing. A copy of the ALJ's decision will be mailed to you or your representative. If you haven't received a decision within 90 days, contact the hearing office. This is important because deadlines for further appeals are calculated from the date on that the decision was mailed. If you have not received a copy of a decision that was mailed to you, you may miss a deadline.

10. Further Appeals

The decision of the ALJ may be appealed to the Labor and Industry Review Commission (LIRC), and LIRC's decision may be appealed to the courts. For detailed information on further appeals, see Parts 2 and 3.

In tax cases, when LIRC interprets a statute differently than the department, LIRC's interpretation must generally be followed by the department from then on. The department is considered to have "acquiesced" (accepted and adopted) LIRC's interpretation. However, the department may decide not to appeal LIRC's decision but also to "non-acquiesce" in the decision. To do this, the department will send a notice of nonacquiescence to be published in the Wisconsin Administrative Register. (A copy will also be sent to you and to LIRC.) The effect of this is that while LIRC's interpretation and decision is binding in that particular case, the department is not required to follow that interpretation in any other cases.